Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Petitioner

INDEX

Cases Cited

STATUTES CITED

SELECTIVE SERVICE MATERIAL CITED

Miscellaneous Citations

Supreme Court of the United States

OCTOBER TERM, 1954

No. 251

ROBERT SIMMONS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

This reply to the brief for the United States will consider the points made in that brief that need replying to in the order in which they appear in that brief.

I.

The respondent (page 2 of its brief) unduly restricts the questions presented. This is done by omitting whether the recommendation of the Department of Justice to the

appeal board was illegal to such an extent as to destory the appeal board classification.

Question number 3, appearing on page 2, stated by respondent contains an erroneous statement about the showing made in the record. To the contrary, the appeal board did rely on the recommendation of the Department of Justice. The recommendation was based on adverse evidence that had not been disclosed to petitioner.—See pages 12-13 of the brief for petitioner.

II.

It is implied erroneously by respondent (page 3 of its brief) that petitioner was employed by the Great Lakes Naval Training Center. To be more precise, petitioner was employed by the United States Civil Service Commission as a chauffeur. There is no evidence or suggestion anywhere in the record that petitioner performed any duties directly connected with the war effort. [R. 43, 48] It is to be noticed that the Department of Justice in its recommendation to the appeal board did not state that petitioner was employed by the navy. It merely stated: "At the present time he is employed as a chauffeur." [R. 53]

III.

It is stated that on October 30, 1951, petitioner filed his special form for conscientious objector. (See page 4 of respondent's brief.) Petitioner started attending meetings of Jehovah's Witnesses in November, 1949. [R. 49] This was at a time when there was no drafting of registrants. The draft was in the "deep freeze."—In re *Fabiani*, E. D. Pa., 1952, 105 F. Supp. 139.

IV.

Reference is made to the testimony of petitioner at the trial. (See footnote 5 on page 5 of the respondent's brief.) The inference from this footnote is that petitioner was claiming to be a minister only and not a conscientious objector. It

is stated that he admitted that he did not discuss his conscientious objector claim with the local board.

It is true that he stated that he talked about his ministerial claim and not about the conscientious objector claim. [R. 31] Nevertheless, it was the responsibility of the local board to consider both classifications. Failure to discuss the conscientious objector claim did not constitute a waiver of it. The duty of the local board to consider all claims for classification is considered in *United States* v. *Fair,* M. D. Pa., 1954, 122 F. Supp. 666:

> "The undisputed evidence in this case clearly indicates that the defendant is a bona fide member of the sect known as 'Jehovah's Witnesses' and because of his belief in the teachings of that sect is conscientiously opposed to military service. The printed portion of the questionnaire under the caption 'REGISTRANT'S STATEMENT REGARDING CLASSIFICATION' reads in part as follows:
>
> 'INSTRUCTIONS: It is optional with registrant whether or not he completes this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. *The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.*' (Emphasis supplied.)"

The petitioner, however, it should be observed, placed a booklet "with each member of the board entitled 'God and the State.' " [R. 30] This booklet pertained to both the ministerial and the conscientious objector status. It is plain, therefore, that while he spoke about his ministerial status he also, by submitting the booklet to the board, presented his conscientious objector claim for consideration. [R. 30] He told the board that he wanted to be classified first as a min-

ister but that he was a conscientious objector. He added that in his case it was necessary, in order for him to be a minister, to be a conscientious objector to war. [R. 29]

The relevance of the testimony given by petitioner at the trial is confined to what took place at the hearing. No *de novo* evidence about his status can be considered for the purpose of determining whether there was basis in fact. —*Cox* v. *United States,* 332 U. S. 442 (1947); *Pine* v. *United States,* 4th Cir., 1954, 212 F. 2d 93.

Since there is no contention that the local board deprived petitioner of procedural due process of law the Court is not here concerned with any action taken by the local board. There is involved here only the appeal board classification, the local board classification having been superseded by the final appeal board classification. Where there has been an appeal taken from the local board classification, the courts are concerned only with whether the local board has deprived the registrant of procedural due process of law. —*United States* v. *Zieber,* 3rd Cir., 1947, 161 F. 2d 90; *United States* v. *Stiles,* 3rd Cir., 1948, 169 F. 2d 455.

V.

On page 6 of its brief the respondent makes a point about the request for personal appearance's saying nothing about the conscientious objector claim. There is nothing in the law that required petitioner to specify his claims in requesting personal appearance. Failure to mention the conscientious objector claim is of no significance. All that the law requires is that he file "a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him."—32 C. F. R. § 1624.1(a).

The memorandum made by the local board states that petitioner was seeking classification as a minister and not as a conscientious objector. [R. 68-69] The fact that a registrant is insisting on a lower classification and mentions he does not want the higher classification does not constitute a waiver of his right to the other classification not urged.

(See 32 C. F. R. §§ 1622.1(c), 1622.2.) It was unnecessary for petitioner to mention the conscientious objector claim either orally at the hearing or by letter requesting the personal appearance, since the papers showing his conscientious objections were on file with the board and it was unnecessary for him to repeat the claim.

VI.

In footnote 6, page 6 of the respondent's brief, it is stated that the letter filed with the local board on or after personal appearance related to his ministerial claim. A reading of the letter shows that it related also to his "neutrality" which is known by all to be the basis for the conscientious objections of Jehovah's Witnesses. [R. 67] The letter related to the conscientious objector claim as well as the ministerial claim.

VII.

Emphasis is placed (page 7 of respondent's brief) on the fact that petitioner's appeal letter of December 18, 1951, did not mention his conscientious objector status but mentioned only that he was a "regular minister of religion." It is immaterial and irrelevant. It is not necessary for petitioner to claim conscientious objector status in his appeal. The appeal itself places the entire case *de novo* before the appeal board.—*Cox* v. *Wedemeyer*, 9th Cir., 1951, 192 F. 2d 920; *Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93.

VIII.

The statement is made (pages 7 and 8, footnote 7, respondent's brief) that petitioner did not request unfavorable information appearing in the FBI report "prior to the hearing." Reference is made in that footnote to the procedure in effect at the time of the hearing. While the written instructions stated that the registrant would be supplied with unfavorable evidence on request prior to the hearing,

the hearing officer did not insist on this advance request. He undertook to refer to the FBI report on his own motion at the hearing. The hearing officer opened the hearing with the statement that he had the draft board file and "also the FBI report" concerning petitioner's case. [R. 19] He stated to Simmons that the FBI report indicated he had been "hanging around pool rooms" and inquired as to whether he was doing that "now." Simmons said he was not. Simmons "asked him what else was in the report." The hearing officer refused to answer this or eluded him. [R. 19]

This action on the hearing officer's part, in voluntarily and on his own motion going into the FBI report, constituted a waiver of any duty of Simmons to insist on his request about the furnishing of the unfavorable evidence appearing in the FBI report prior to the hearing. The hearing officer waived the requirement of prior written request by voluntarily going into the matter himself. It is out of place and of no consequence for the respondent to suggest here that petitioner is in no position to complain of the action of the hearing officer. Had there been a total failure to go into the FBI report, then the position of the respondent might be good, but since the hearing officer went into the FBI report at the hearing it is of no consequence whatever that petitioner did not request in writing in advance of the hearing the adverse information. The hearing officer did not insist that petitioner waived his right. The hearing officer did not claim a waiver. It is too late for the respondent at this stage of the proceedings to mention this point. This point urged here was not relied on by the court below.

IX.

The statement is made on page 8 by the respondent that the hearing officer noted that "there was some evidence of present sincerity." (See also respondent's brief at page 35.) The recommendation of the Department of Justice informs the appeal board that the "Hearing Officer reports regis-

trant impressed him as sincere." [R. 54] Even the recommendation of the Department of Justice recognized that petitioner was sincere, stating: "In addition to the fact that his religious activities coincide with pressing induction possibilities, registrant's absorption and sincerity to his newly found religion is rendered more questionable by his abusiveness and the exercise of physical violence towards his wife." [R. 54] Even the secret informants believed petitioner to be sincere. [R. 54] The recommendation of the Department of Justice fails to state explicitly that petitioner is not sincere. [R. 54-55]

X.

The respondent fails to show the Court that petitioner's police record and convictions antedated his conversion and baptism as one of Jehovah's Witnesses in October, 1951. [R. 54] It is true that he had been in training a little less than two years before this date, but the proof shows that he had changed. [R. 53-54] The visit by the police on January 6, 1952, according to the secret FBI report (referred to on page 9 of respondent's brief), was not an arrest. In any event, these family disorders do not prove that petitioner is not a conscientious objector, inasmuch as there is no challenge to his sincerity.

XI.

Petitioner does not state that this Court should disregard the surrounding circumstances, as suggested by respondent on page 17 of its brief. Petitioner admits that if there are any relevant facts appearing in the file that contradict and impeach the claim, these facts can be considered. Petitioner does state that irrelevant and immaterial facts and speculations advanced by respondent do not constitute basis in fact. There is no disagreement between respondent and petitioner as to the rule of law to be applied. It is the enforcement of the rule where the parties divide.

XII.

It is stated by respondent (pages 11 and 18 of its brief) that petitioner did not claim he was a conscientious objector at the time he registered. It is true that he did not show that he was a conscientious objector at that time, but 32 C. F. R. §§ 1625.1 and 1625.2 authorize petitioner to make a showing that he was a conscientious objector after his registration.—*United States* v. *Vincelli,* 2d Cir., 1954, 215 F. 2d 210, affirmed with opinion on rehearing, 1954, 216 F. 2d 681; *Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633.

XIII.

The fact that petitioner's claim for classification as a conscientious objector occurred in October, 1951, does not *per se* prove him to be in bad faith. (See respondent's brief, page 18.) It is true that hostilities had begun before that date. However, long before hostilities had begun petitioner had become a conscientious objector. There was no occasion for him to make his objections known until his deferred marital classification was taken away from him in October, 1951. (*United States* v. *Vincelli,* 2d Cir., 1954, 215 F. 2d 210, affirmed with opinion on rehearing, 1954, 216 F. 2d 681) In October, 1951, it then became necessary for petitioner to make his new status known. This was time enough.—*United States* v. *Vincelli, supra; Hull* v. *Stalter,* 7th Cir., 1945, 151 F. 2d 633.

XIV.

It is asserted on page 18 of respondent's brief that the answer of petitioner to question 3 was vague. There is nothing vague about his answer. Neither the Department of Justice nor the local board challenged the answer or called for a bill of particulars. It is said that his answer to question 6 of Series II [R. 47-48] is proof that he was seeking only a ministerial classification. This is erroneous. While he was seeking a ministerial classification, he did not abandon his conscientious objector claim. The best

proof that one of Jehovah's Witnesses is sincere is that he be a minister in the group. Jehovah's Witnesses are an organization of ministers and missionaries, so participation in the preaching activity is a conspicuous demonstration of the test of his convictions. It proves his sincerity. The religious preaching activity was proof of his conscientious objections.

The objection of the respondent is a quibbling over words. What is said about the answer to question 6 applies with equal force to question 7. (See the answer, on page 48 of the record.) There is nothing wrong about his answer here. The only opportunity he had to give public expression to the views was in his preaching activity from house to house and on the streets. This is not unusual. It does not prove that he was abandoning his conscientious objector claim. (See Local Board Memorandum No. 41, issued by National Headquarters of Selective Service System, November 30, 1951, as amended August 15, 1952.) This memorandum proves that there cannot be a waiver of the conscientious objector status in the absence of an express written waiver. Circumstances and arguments of this kind made by respondent constitute no basis for a denial of the conscientious objector status.

XV.

The suggestion is made by respondent several times that petitioner is not entitled to be classified as a conscientious objector because he was employed at the United States Naval Base. (See respondent's brief, pages 12, 18, 22.) It should be remembered that there is no evidence that petitioner was directly participating in the war effort. The record shows he was merely a chauffeur for the United States Civil Service Commission at the Great Lakes Naval Training Center. [R. 43, 53] His presence at the base did not make him a direct participant. Suppose he had been working at a drugstore, a café or a grocery store at the

naval base. This certainly would not be direct participation in naval service.

The argument of respondent on this point is presented here for the first time in these proceedings. The local board, the appeal board, the district court and the court of appeals did not consider this suggestion urged here for the first time as basis in fact. The Department of Justice in its recommendation did not rely upon it. Respondent's position in raising the point at this late date is inconsistent with the stand the Department of Justice took before the appeal board.

In any event, this is not a relevant basis for the denial of conscientious objector status.—See the arguments appearing in the brief for petitioner in *Gonzales* v. *United States,* No. 69, October Term, 1954, and *Witmer* v. *United States,* No. 164, October Term, 1954.

XVI.

On page 22, footnote 10, respondent cites the case of *White* v. *United States,* 9th Cir., 1954, 215 F. 2d 782, 785-786. This case relates to the I-A-O classification. The United States Court of Appeals for the Ninth Circuit has made a distinction between classifications I-A and I-A-O, for the purpose of relevance of doing war work. That court has held that if the classification is I-A-O the performance of war work is relevant and material as a basis for the denial of the conscientious objector status. However, that court has held that where the classification is I-A the performance of war work is not material. (See *Franks* v. *United States,* 9th Cir., 1954, 216 F. 2d 666; *Goetz* v. *United States,* 9th Cir., 1954, 216 F. 2d 270; *Clark* v. *United States,* 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —.) The United States Court of Appeals for the Seventh Circuit has held that the performance of defense work is irrelevant for the purpose of denial of conscientious objector status.—*United States* v. *Wilson,* 7th Cir., 1954, 215 F. 2d 443.

XVII.

It is argued (page 9 of its brief) by respondent that upon personal appearance petitioner was seeking classification only as a minister of religion and not as a conscientious objector. The fact that he was seeking the ministerial classification does not spell abandonment of the conscientious objector status.—See the argument given, *supra*, under point IV.

There cannot be a waiver of the conscientious objector status because of petitioner's claiming the ministerial classification. (See *Cox* v. *Wedemeyer*, 9th Cir., 1951, 192 F. 2d 920; *Pine* v. *United States*, 4th Cir., 1954, 212 F. 2d 93.) These cases also reject the argument made by respondent (at the top of page 20 of its brief) that the appeal was limited to the ministerial claim. This contention is contrary to law. 32 C. F. R. § 1626.26 prescribes that the procedure by the appeal board shall be *de novo*.

XVIII.

It is admitted by respondent (page 20 of its brief) that upon appeal the case was referred to the Department of Justice. The very fact that this was done shows that the appeal board did not consider that petitioner had waived his conscientious objector claim. It shows that the appeal board considered that the conscientious objector claim was involved on the appeal as though petitioner had filed the claim timely.

XIX.

The point is made (page 22 of its brief) by respondent that because petitioner made his claim after he was taken out of Class III-A and again classified I-A, the claim was made so late as to prove insincerity. Under 32 C. F. R. §§ 1625.1 and 1625.2 petitioner had the right to make the claim at a late date. (*United States* v. *Vincelli*, 2d Cir., 1954, 215 F. 2d 210, affirmed with opinion on rehearing, 1954, 216

F. 2d 681; *Hull* v. *Stalter*, 7th Cir., 1945, 151 F. 2d 633) Since the law authorizes the making of the late claim, how is it that the respondent thinks it can rely on what the law allows, as a basis for the denial of the conscientious objector status? This is taking that which is lawful and using the procedure provided by the regulations as a basis in fact for denying the claim for classification.

XX.

The reliance by respondent (page 22 of its brief) upon the so-called violent and abusive behavior of petitioner toward his wife is wholly irrelevant and immaterial. It is based on the most unreliable evidence. The FBI report referred to a police court record. The report did not give the particulars. The mere conviction of a crime of assault and assessment of a fine for the offense does not *per se* prove that petitioner is insincere and not a conscientious objector. Even a conscientious objector can have trouble with his wife. It is no reason for penalizing a conscientious objector for this misfortune that befalls men of other classes. The FBI report was hearsay. It is doubly unjust to rely upon this evidence, because it was not drawn to petitioner's attention, and neither he nor his wife had the opportunity to defend, before the administrative agency, the use of this evidence.

XXI.

The respondent (page 24 of its brief) states that "lateness of religious conversion or of a crystallization of religious scruples against participation in war" does not preclude a sincere conscientious objector from obtaining exemption. This concession is made ridiculous by what thereafter follows. Respondent says if the conversion takes place after one becomes liable for military service or during the time one is within the draft age, such conversion would be a circumstance to prove insincerity. It is preposterous for the respondent to make such a concession in one breath and take it away in the next with the impossible condition

imposed. From the absurd argument it can be taken that a newly converted conscientious objector cannot be sincere unless he is outside the age bracket for military service in time of war or unless he is converted during peace time, when there is no draft law in effect.

With the future of this country confronted not with peace but with war, in time there would be no conscientious objectors recognized in this country. All would be in prison under this theory of interpretation of the statute, unless they were born and reared as conscientious objectors. But even Jehovah's Witnesses born and reared as conscientious objectors, according to the respondent, are not entitled to exemption under the conscientious objector provision because of their belief in theocratic warfare and self-defense. The petitioner would be in no better standing, under the law according to respondent, had he been born and reared as one of Jehovah's Witnesses. This argument is answered in the reply brief for petitioner in *Sicurella* v. *United States*, No. 250, October Term, 1954.

XXII.

Respondent states on pages 28, 30-31 of its brief that petitioner was properly denied the conscientious objector status because he relied "solely upon his own statements." The local board did not question the veracity of petitioner. The truthfulness of his statements was not challenged by the hearing officer or the Department of Justice in its recommendation.

All statements of fact made by petitioner in his conscientious objector form and in his statements are subject to perjury prosecutions. They are the equivalent of sworn testimony under the act and regulations. It cannot be asserted that his claim is a mere allegation. It is based on sworn testimony.

It is true that his statements were not corroborated by others of Jehovah's Witnesses through the filing of affidavits. But his claim is corroborated by others of Jehovah's Witnesses through the FBI report. In the recommendation

by the Department of Justice it is brought out that all of petitioner's references, four in number, corroborated his claim for classification as a conscientious objector. The recommendation states: "References, all of whom are members of the same sect, believe registrant is sincere, as do his neighbors." [R. 53]—See the names of references. [R. 50]

Since the Department of Justice procedure is for the benefit of the claimant (*White* v. *United States*, 9th Cir., 1954, 215 F. 2d 782; *Tomlinson* v. *United States*, 9th Cir., 1954, 216 2d 12), it must be assumed that petitioner corroborated his statements by the testimony of the references given to the Department of Justice. It cannot be argued that he failed to corroborate his claim. It was not necessary that he file sworn affidavits, especially since the FBI report verified his sincerity through the informants, who were Jehovah's Witnesses and his neighbors. Petitioner did, therefore, reinforce "his personal statements with additional evidence sufficient to preclude rational men from attaching significance to circumstances which would otherwise provoke doubts."—Respondent's brief, page 28.

XXIII.

Respondent makes a sharp contrast between conscientious objector cases and minister of religion cases at pages 28-29 of its brief. It states that what the registrant does is important only in relation to his "mental state." The religious beliefs of petitioner are objective and easily established. They are undeniably opposed to participation in combatant and noncombatant military service. The belief of petitioner in the Supreme Being is undisputed and certainly objective. No one would deny his belief in the Supreme Being. The undisputed evidence shows he objects to military service. This certainly must be considered. It also is established without doubt that his belief is based on religious training and belief.

Whether he is sincere does not involve an impossible mental examination or a searching of his heart. His insin-

cerity can be established by determing if he is a hypocrite, such as determining that he lives a life inconsistent with the standards of Jehovah's Witnesses. It could be shown he is a hypocrite by showing that he does not carry out his preaching obligations as one of Jehovah's Witnesses, or that he does not attend the religious meetings of Jehovah's Witnesses, or does not practice what he preaches. But none of such circumstances or evidence of hypocrisy and insincerity is present here.

The respondent takes many innocent circumstances and cements them together and then attempts to make them stand up as evidence of insincerity. Such elements that have been put together will not adhere and hold, because they are not material factors bearing on the "good faith of the objections of the person concerned."—Respondent's brief, page 29.

What Congress was after in reference of the case to the Department of Justice were not opinions and speculations, but facts. See what Senator Gurney said in making known his objections to the creation of a separate conscientious objector agency, when hearings were had on Senate Bill 2655: "What we are after really are the facts and the Department of Justice has always shown itself perfectly capable of uncovering the facts."—94 Cong. Rec. 7305.

Actually, what Congress was after by reference of the case to the Department of Justice were facts and circumstances that were inconsistent with the religious beliefs of the organization to which the conscientious objector belonged. The respondent here has never attempted to turn up any fact showing that petitioner has done that which is inconsistent with his religious beliefs. The facts turned up are facts inconsistent with what the respondent says is a true conscientious objector. This attempt of respondent to constitute itself a hierarchy of conscientious objectors under the law is contrary to the intent of Congress. It permits the respondent to discriminate, contrary to equal justice under law.

XXIV.

Contrary to what respondent says (page 30 of its brief), before "his demeanor" and "circumstances surrounding the assertion of his claim" can take on any significance against a conscientious objector, it must be shown that the "demeanor" and "circumstances" are relevant. Insofar as "demeanor" is concerned, there is no documentary memorandum in the file showing that petitioner's demeanor gave rise to a belief that he was insincere. Neither the memorandum of the local board nor the report of the hearing officer indicated a bad demeanor. The absence of this record gives rise to the presumption that there was no bad demeanor. —*Williams* v. *United States*, 5th Cir., 1954, 216 F. 2d 350.

Suppose the government did not like the way a registrant parted his hair or that the hearing officer believed the registrant claiming to be a conscientious objector did not show proper meekness; such would not be any "circumstances surrounding the assertion of his claim" that would take away his rights to the deferment.—*Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689.

XXV.

The Court ought not to overlook the argument raised by petitioner under point one of his brief that the recommendation of the Department of Justice, based on the late association of petitioner with Jehovah's Witnesses as a conscientious objector, is an illegal recommendation that destroyed the proceedings. An illegal recommendation followed by the appeal board destroyed the final classification.—*Annett* v. *United States*, 10th Cir., 1953, 205 F. 689; *Taffs* v. *United States*, 8th Cir., 1953, 208 F.2d 329; *Clementino* v. *United States*, 9th Cir., 1954, 216 F. 2d 10; *Goetz* v. *United States*, 9th Cir., 1954, 216 F. 2d 270; *Clark* v. *United States*, 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —; *Shepherd* v. *United States*, 9th Cir., No. 14,105, Dec. 13, 1954, — F. 2d —.

See the main brief for petitioner in the companion case

of *Gonzales* v. *United States*, No. 69, October Term, 1954, at pages 49-51.

XXVI.

At pages 14, 31-34 of its brief respondent contends that petitioner failed to demand the unfavorable evidence in writing before the date set for the hearing before the hearing officer.

Heretofore it has been pointed out, under point VIII, *supra*, that while the petitioner did not request the evidence in writing he did orally request it. It is further shown that the hearing officer waived entirely the failure of petitioner to request in writing the unfavorable evidence prior to the hearing. The hearing officer himself called some of the adverse evidence to the petitioner's attention. Then petitioner requested all the evidence, which was not given to him.

XXVII.

An oral request for the unfavorable information, made at the hearing, is sufficient. Registrants are not to be dealt with as though they were litigants represented by counsel. (*Berman* v. *Craig*, 3rd Cir., 1953, 207 F. 2d 888, 891) This is especially true now that the Department of Justice, since 1953, follows the practice of giving a summary or résumé even when not requested.

The burden falls upon the Department of Justice to show that it is harmed by an oral request made at the hearing. Unless the hearing officer says that he is unprepared because of lateness it is not in order to speculate that the oral request was inadequate.

XXVIII.

Respondent (page 34 of its brief) criticizes the statement that a proper interpretation of the law requires notice of the adverse evidence whether requested or not. The practice of the Department of Justice since September,

1953, supports the interpretation put upon the law by petitioner and answers the criticism appearing at the top of page 34 of respondent's brief. If there were no basis for petitioner's statement that the change took place as a result of *United States* v. *Nugent*, 346 U. S. 1, then why did the Department make the change immediately after the *Nugent* decision? Then for the first time it started giving registrants a summary of the FBI report whether or not it was requested before the date set for the hearing.

XXIX.

Petitioner challenges the limitation of the right to be provided with adverse information. Respondent limits the right to only such adverse evidence that will thereafter be relied upon in the Department's recommendation. (See its brief, pages 34-35.) At the time of the hearing, how can petitioner know what the Department will thereafter rely upon? It is the duty of the Department to provide petitioner with a fair summary of all the unfavorable evidence in the FBI report. This right does not hinge on what may thereafter be recommended to the appeal board by the Department. A rule that would confine the providing of information only to that which appears in the recommendation to the appeal board puts the cart before the horse and places the entire matter solely in the unreachable discretion of the Department of Justice. Congress did not intend thus, because, as has been shown heretofore, Congress said that it was after the facts. How can the facts be obtained if the Department of Justice shall say what part of the facts it shall divulge?—See, *supra*, under point XXIII, what Senator Gurney said, at 94 Cong. Rec. 7305.

XXX.

At page 35 of respondent's brief the argument is made that the appeal board has no knowledge of the unfavorable contents of the FBI report. While this may be true, the harm of not revealing all the unfavorable evidence to the

petitioner is not cured by concealing it from the appeal board.

It should be remembered that the Department of Justice makes its recommendation upon the entire FBI report. It is not necessary for the Department to summarize in its recommendation all the unfavorable evidence. There may be and often is a great deal of unfavorable evidence that would lead the Department to its adverse recommendation that may never be mentioned. To argue that notice of the adverse evidence is confined only to what appears in the recommendation is to ignore reality and greatly to curtail and limit petitioner's right. He cannot be given a summary of only what might thereafter be referred to by the Department of Justice. How can the hearing officer or the petitioner at the hearing know what may thereafter be relied on by the Department of Justice in its recommendation to the appeal board?

XXXI.

It is said by respondent on page 36 of its brief that petitioner was told of the adverse evidence about his drinking and gambling, and respondent refers the Court to petitioner's brief at page 40 and to the record at page 19 for corroboration. This does not appear from the record or from petitioner's brief to be true. All that was stated by the hearing officer was that petitioner had been hanging around pool rooms. [R. 19] This certainly is not equivalent to saying that he had been drinking and gambling. Petitioner was not informed of the adverse evidence about drinking and gambling. [R. 10] The information by the informant, according to the Department's recommendation, was that petitioner was "a rather heavy drinker and crap shooter," but there is nothing in the record to show that that information was called to the attention of petitioner, as claimed by the respondent on page 76 of its brief. It is error for respondent to say that petitioner admitted at the trial and in his brief that he was notified about all this adverse evidence. The

statement appearing on page 36 of respondent's brief to this effect is challenged.

XXXII.

Respondent admits (pages 36-37 of its brief) that the reference to the police record was expressly relied upon in its recommendation to the appeal board. This admission, coupled with the undisputed evidence that this was not called to petitioner's attention, brings this matter squarely within *United States* v. *Bouziden*, W. D. Okla., 1952, 108 F. Supp. 395, 398, 399.

The respondent (page 37) attempts to minimize the damage done to petitioner at the hearing before the hearing officer. Respondent omits to call to the Court's attention what occurred after petitioner's wife was asked how Simmons was treating her, and she said "Fine." The hearing officer thereupon threw petitioner off his guard and misled him into believing that there was no need for further pursuing the request for unfavorable evidence. The hearing officer said he was "going to recommend me for ministerial status to Washington." [R. 19] This was highly misleading, for the hearing officer knew that petitioner had just asked him "what else was in the report." [R. 19] Yet the hearing officer evaded Simmons on the request and then misled him, following the question to his wife as to how he had been treating her. [R. 19] It is evident, therefore, that never at any time did petitioner get notice of any of the unfavorable evidence in the FBI report about the trouble with his wife and the police record based thereon. However, it is wrongly implied to the contrary in respondent's brief that he did receive such notice.

XXXIII.

It is argued (page 37 of respondent's brief) that petitioner did not contend that he did not understand the question relating to his past treatment of his wife. There is nothing on the face of the question that it related to past

treatment. Petitioner does contend that he did not understand this question. Had he understood it and been called upon to answer, he and wife would have undoubtedly been able to explain the matter. It should be remembered that the petitioner was misled by the hearing officer immediately after his wife said "Fine," into believing that "he was going to recommend me for ministerial status to Washington." [R. 19]

XXXIV.

It is said (pages 37-38 of respondent's brief) that petitioner did not offer to show that he was prejudiced by the refusal of the hearing officer to make a full and fair summary of the FBI report. As to that part appearing in the recommendation of the Department of Justice, it was unnecessary for him to state that he was prepared to impeach or contradict the information. It is to be presumed that he would be able to explain it had he been apprised of it. It involved speculation of the wildest sort to conclude that petitioner was not harmed. Prejudicial error was committed by the Department of Justice. The burden fell on the government, when it failed to make a full and fair summary, to prove that the petitioner did not act in self-defense or was not provoked. (See respondent's brief, page 38.) As to the undisclosed unfavorable evidence appearing in the FBI report, it is impossible to know what petitioner could have said.

XXXV.

Respondent relies on *Market Street Railway Co.* v. *Railroad Comm. of California,* 324 U. S. 548, 560-561, (1945). The case here is identical to *Ohio Bell Telephone Co.* v. *Public Utilities Comm. of Ohio,* 301 U. S. 292 (1937), cited in the *Market Street Railway* case, at pages 559-560. The Court said: "Nothing of that kind occurred in this case." (324 U. S., at page 560) But it should be remembered that in this case something of that kind did occur. Consequently

Market Street Railway Co. v. *Railroad Comm. of California, supra,* is not applicable.

Concerning the use of reports of the Market Street Railway Company by the commission, discussed by the Court at pages 561-562, this holding, also, is not applicable. In that case the commission actually used the records of the company, which were, of course, outside the administrative record. It was merely a part of a great heap of testimony relating to the general subject.

That case did not involve a situation such as the one we have here. There was no general inquiry into the subject at all. There was an inquiry into the revenue, and the commission went outside the record and got one little piece of evidence to add to the great abundance of evidence already in the record on the subject. Here the entire general subject of petitioner's mistreatment of his wife and the criminal record based thereon was not even referred to. In such a situation it is not necessary for the registrant at his trial to prove what he would have said had this been drawn to his attention. The burden was on the government to prove that he was not prejudiced.—*Kotteakos* v. *United States,* 328 U. S. 750, 760-761.

In the *Market Street Railway Co.* case the objections to the procedure employed had "no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with commissions." (324 U. S., at page 562) Here the subject matter was not a continuous one, but was one isolated event in a man's life that had never been called to his attention. The reference to this was not "an incidental reference as we have here to a party's own reports," but the reference was direct and not incidental. It was itself an entirely new matter of which petitioner had no notice whatever. The petitioner was, therefore, harmed and the "prejudice constitutes a want of due process."—See 324 U. S., at page 562.

The contention that it is necessary to show in the record in what manner the petitioner would contradict or explain

the illegal evidence heard or received in star-chamber proceedings by use of the secret FBI report is invalid and inapposite. Let an analogy suffice to prove that petitioner has not waived his point. Suppose that a trial judge in a criminal case tried without a jury, as this case was, receives evidence secretly from one of the parties in his chambers. Certainly an appellate court, as a condition precedent to reversal, would not require the defendant to show that he was prepared to prove the falsity of the evidence before a reversal would result. Such is the situation here. It is the use of the adverse evidence without giving a summary which *ab initio* the use makes the proceedings void. Whether the evidence was truthful or not is immaterial. The use of such evidence without notice is a violation of procedural due process of law.

XXXVI.

At the bottom of page 40 and the top of page 41 of respondent's brief it says that had the production of the FBI report been compelled at the trial it would mean an inquiry "into the mental processes underlying the Department's recommendation." This is a most farfetched statement. On page 32 of its brief respondent has admitted that *United States* v. *Nugent,* 346 U. S. 1, 6, required that petitioner be supplied with a fair résumé of the unfavorable evidence. It was a question of judicial inquiry, not into the mental processes of the officers in the Department of Justice, but whether those officers had given a full and fair summary of the unfavorable evidence. The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is full and fair without reading the book? Would a subpoena requiring the compulsory production of the book mean going into the mental processes underlying the author's work? Certainly not. The judicial function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a

fair summary of the adverse evidence was given until the FBI report, which was summarized, is produced for comparison.

This certainly answers the argument (page 41 of respondent's brief) that it is anomalous to hold that a registrant is not entitled to see the report at the hearing but can see it at the criminal trial. It would not only be anomalous but ridiculous to hold that if a registrant was entitled to have a full and fair summary at the hearing he could not have the summarized document at the trial to determine whether or not it had been fairly summarized.

XXXVII.

As for what is said in footnote 17, on pages 41-42 of respondent's brief, about the subpoenaing of the FBI report in *United States* v. *Packer,* 346 U. S. 1, and the denial of the petition for rehearing, 346 U. S. 853, it can be said that this Court was not concerning itself with that issue because that was not the question that had been presented to the Court in the petition for writ of certiorari. It was not the question that had been ruled upon by the Court of Appeals. Consequently it was not before the Court. If it be held that the question was before the Court, then petitioner here and now challenges the holding of this Court in the case of *United States* v. *Packer,* and asks the Court to overrule that holding and hold that it is erroneous for the reasons set forth here and in the main brief in this case.

It is plain that petitioner was entitled to have the FBI report produced at the trial, since a summary of it had been given to him at the hearing by the hearing officer. Moreover, the record in the *Packer* case shows there was nothing unfavorable in the FBI report. Here the recommendation of the Department of Justice does refer to unfavorable evidence. In this respect the two cases are dissimilar.

XXXVIII.

At the bottom of page 44 and the top of page 45 of respondent's brief, the argument is made that this Court cannot assume that there was other unfavorable evidence in the file. This argument ignores reality. There is no procedure in the Department of Justice that regulates the recommendations of the Department of Justice to the appeal board to command a summary of all the unfavorable evidence. There is nothing in fact to request the Department to refer to any unfavorable evidence. It can merely recommend that the conscientious objector claim be denied. It should be remembered that the concluding paragraph of every adverse recommendation of the Department of Justice reads: "After consideration of the entire file and *record,* the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and noncombatant training and service be not sustained." (Emphasis supplied.) [R. 54-55]

It is to be seen from this quotation that the recommendation is based on the "record." The "record" here refers to the record of the Department of Justice. This "record" is to be distinguished from the "entire file," which refers to the draft board file. Since there is no appraisal of the "record" and no itemization of the adverse evidence appearing in the "record" of the Department of Justice, including the secret FBI report, it requires the wildest sort of speculation to say that the recommendation of the Department of Justice is not based on some undisclosed adverse evidence. Neither the court nor the registrant and his counsel have any way of telling whether there was other adverse evidence in the "record" without seeing the FBI report, which is part of that "record." Since the recommendation is based on the "record" and the "record" includes the secret FBI report, and the final appeal board classification is based on the recommendation, the undis-

closed adverse evidence is made a basis for the denial of the conscientious objector classification. The argument appearing at the bottom of page 44 and the top of page 45 should, therefore, be rejected.

It is stated that the issue of subpoenaing the FBI report "would be irrelevant in determining whether petitioner's classification by the appeal board has a basis in fact." (Respondent's brief, page 45) The issue to be determined, to which the subpoena of the FBI report is relevant, is not whether there was basis in fact. The issue is whether there was a fair résumé of the unfavorable evidence given to the registrant. See page 32 of respondent's brief, where it is conceded that this is the issue. The statement on the top of page 45 is, therefore, wholly irrelevant to the question raised by quashing the subpoena.

XXXIX.

Again it is stated, on the same page, that to allow the subpoena to stand would be "an all-out collateral attack." This is a ridiculous argument. How can it be a collateral attack? It is a direct attack. The issue is: Did the Department of Justice deprive petitioner of procedural right to due process of law? The only way this can be established is by the production of the FBI report. When the FBI report is produced it will not be a collateral attack against the draft board order or proceedings, but a direct attack, showing there has been a deprivation of procedural due process of law.

XL.

Respondent next suggests, on the same page, that "the Department's recommendation has been superseded by the appeal board's decision." This is hardly correct. In fact it is flagrant error. Recall that the order to report is based on the appeal board decision and the appeal board decision is based on the Department's adverse recommendation. The appeal board decision is identical to the recommendation. The recommendation is similar to a general

charge. The decision of the appeal board is like a general verdict. How can it be said that the recommendation (general charge) is not a part of the chain of proceedings? (See *United States* v. *Romano*, S. D. N. Y., 1952, 103 F. Supp. 597; *Annett* v. *United States*, 10th Cir., 1953, 205 F. 2d 689; *Taffs* v. *United States*, 8th Cir., 1953, 208 F. 2d 329; *Hinkle* v. *United States*, 9th Cir., 1954, 216 F. 2d 8; *Clementino* v. *United States*, 9th Cir., 1954, 216 F. 2d 10; *Goetz* v. *United States*, 9th Cir., 1954, 216 F. 2d 270; *Clark* v. *United States*, 9th Cir., No. 14,176, Dec. 3, 1954, — F. 2d —; *Shepherd* v. *United States*, 9th Cir., No. 14,105, Dec. 13, 1954, — F. 2d —; *Affeldt* v. *United States*, 9th Cir., No. 13,941, Dec. 14, 1954, — F. 2d —; *Batelaan* v. *United States*, 9th Cir., No. 13,939, Dec. 17, 1954, — F. 2d —.) All of these cases held that where the appeal board decision is based on the adverse recommendation of the Department of Justice the draft board order is illegal.

XLI.

At the top of page 46 of respondent's brief it is said that petitioner "has at no time set forth reasons for belief that the F. B. I. report contained information adverse to his claim which was not disclosed to him." This suggestion has heretofore been answered under points XXXIV and XXXV, *supra*.

The subpoena for the FBI report was not issued "in the vague hope that it contains adverse evidence" but so that the trial court could discharge its judicial function to decide that question. This could only be determined by the trial court's seeing the FBI report.

XLII.

On the bottom of page 46 and the top of page 47, it is argued by respondent that the Department of Justice proceedings were "auxiliary and nondecisive" and "purely collateral." It has heretofore been shown that when the report and recommendation of the Department of Justice are relied upon, those proceedings become a link in the

chain action beginning with the registration and ending with the draft board order to report for induction. The only way these proceedings could become irrelevant would be for the appeal board to classify the petitioner as a conscientious objector. Since this was not done, it cannot be said that the proceedings are irrelevant.

XLIII.

On page 47 of the brief the respondent says that "there must be some such showing of special circumstances to justify a court in going behind the record on which the appeal board, which had the duty of classifying, acted." It heretofore has been pointed out in the quoted part of the Department of Justice recommendation, *supra,* under point XXXVIII, that it is based on the entire "record" of the Department of Justice, which includes the entire FBI report. This is a special circumstance. The very fact that the Department of Justice told the appeal board that it had the "record" shows that the appeal board was led to believe that the Department of Justice had more than was specified in the recommendation. A mere statement of some of the evidence as basis for its recommendation does not dispel the suggestion that the Department had other evidence appearing in its "record," referred to in the recommendation.

XLIV.

It is stated on page 47 of its brief by the respondent that this Court must rely upon the presumption of regularity in adminstrative proceedings. Notwithstanding *Koch* v. *United States,* 4th Cir., 1945, 150 F. 2d 762, 763, and *United States* v. *Fratrick,* 7th Cir., 1944, 140 F. 2d 5, 7, to the contrary, petitioner says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

In *Jones on Evidence in Civil Cases,* Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1,

§101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop* v. *United States*, 165 U. S. 486 (1897), and *Edwards* v. *United States*, 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions.

It is submitted, therefore, that it is erroneous for the respondent to contend that the presumption of regularity can be relied on in criminal proceedings.

XLV.

It is argued in respondent's brief, at pages 48-49, that there is no showing of materiality. To begin with, this is not a motion under Rule 16 of the Federal Rules of Criminal Procedure. The subpoena has been issued under Rule 17(c). The rule for determining the validity of a subpoena is entirely different from that of determining the merit of pretrial discovery. It is impossible to determine materiality of the document on quashing the subpoena.—See petitioner's main brief, at pages 68-70.

CONCLUSION

For the reasons stated above and for those appearing in the main brief for petitioner, it is submitted that the judgment of the court below should be reversed.

Respectfully,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

January, 1955.